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90-851

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

---

CHARLES B. CARROLL,

Petitioner,

against

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

PETITION FOR WRIT OF CERTIORARI

---

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Billings, MT 59101

GEORGE T. RADOVICH
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Counsel for Petitioner

## QUESTIONS PRESENTED

1) Did the Court of Appeals err in affirming the judgment of the United States District Court for the District of Montana, based upon its Memorandum Opinion and Order, which found that maximum sanctions should be imposed under Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure and Petitioner's case be dismissed? Are these sanctions warranted in view of the prior opinions of the Ninth Circuit Court of Appeals and is the Opinion of the Ninth Circuit Court of Appeals in conflict with their previous decisions?

2) Did the Court below deprive the Petitioner of his property without due process of law?

## INDEX

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented . . . . . | i |
| Opinions Below . . . . . | 2 |
| Jurisdiction . . . . . | 2 |
| Statutes Involved . . . . . | 2 |
| Statement of the Case . . . . . | 4 |
| Reasons for Granting the Writ . | 8 |
| Conclusion . . . . . | 13 |
| Appendix . . . . . | 14 |
| Exhibit A: In the United States District Court for the District of Montana, Billings Division: | |
| Memorandum Opinion and Order ..... | 14 |
| Motion for Reconsideration..... | 26 |
| Memorandum in Support of Motion for Reconsideration..... | 28 |
| Memorandum and Order. | 35 |

United States Court of Appeals
for the Ninth Circuit:

Memorandum ..... 40
Petition for Rehearing. 42
Order ..... 51

Exhibit B: United States of America
for the Use and
Benefit of Wiltec Guam,
Inc. vs. Kahaluu
Construction Co., Inc.,
and Industrial Indemnity
Co., 857 F.2d 600
(9th Cir. 1988) ..... 52

## INDEX

## CASES CITED


| | Page |
|---|---|
| Falstaff Brewing Corporation v. Miller Brewing Company, 702 F.2d 770 (9th Cir. 1983) | 12 |
| Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987) | 8,9 |
| People of Territory of Guam v. Reyes, 800 F.2d 940 (9th Cir. 1986) | 12 |
| Raiford v. Pounds, 640 F.2d 944 (9th Cir. 1981) | 12 |
| Toth v. Trans World Airlines, Inc., 862 F.2d 1381 (9th Cir. 1988) | 12 |
| U.S. For Use of Wiltec Guam v. Kahaluu Construction, 857 F.2d 600 (9th Cir. 1988) | 10,11 |
| United States v. National Medical Enterprises, Inc., 792 F.2d 906 (9th Cir. 1986) | 12 |
| Wyle v. R.J. Reynolds, Inc., 709 F.2d 585 (9th Cir. 1983) | 12 |

## STATUTES CITED

Constitution of State of Montana, Article II, Section 17 . . . . 4

Rule 37(b)(2), Federal Rules of Civil Procedure. . . . . 2-4

United States Constitution, Amendment 14 . . . . . 4

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

No._____

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CHARLES B. CARROLL,

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against

INSURANCE COMPANY OF NORTH AMERICA,

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**PETITION FOR WRIT OF CERTIORARI**

**TO THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

---

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 16, 1990. Rehearing denied on

September 11, 1990.

## OPINIONS BELOW

The Memorandum Opinion and Order for dismissal of the District Court of the District of Montana, Billings Division, holding that the Petitioner's Complaint is dismissed, is found in Appendix Exhibit "A". The opinion of the Circuit Court of Appeals affirming the judgment of the District Court is found in Appendix Exhibit "A".

## JURISDICTION

The order and decision of the United States Court of Appeals was entered on August 16, 1990, with an order denying rehearing entered on September 11, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

Rule 37(b)(2) of the Federal Rules of Civil Procedure, provides

"(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party files to obey an order entered until Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or arts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or

mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination."

Amendment 14 to the United States Constitution provides

" Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article II Section 17 of the Constitution of the State of Montana provides

"No person shall be deprived of life, liberty, or property without due process of law."

## STATEMENT OF THE CASE

This case involves an action for

enforcement of a Judgment entered in state district court in Montana in favor of Petitioner Charles Carroll. Respondent Insurance Company of North America denied liability on the coverage of the Judgment. The amount of the Judgment involved is One Hundred Twenty-Five Thousand Dollars ($125,000.00).

This appeal specifically concerns the district court's dismissal of the Complaint and whether the sanctions imposed, under Rule 37 of the Federal Rules of Civil Procedure, are excessive and deprive the Petitioner of his property without due process of law.

On March 18, 1987 Petitioner Charles Carroll filed a Complaint seeking to enforce payment through insurance coverage of the Confession of Judgment entered into on January 22, 1987 in state district court.

The Respondent Insurance Company of North

America filed its Answer on June 23, 1987. On July 27, 1987 Respondent filed Interrogatories to the Petitioner with Answers due on August 26, 1987. By stipulation between the parties, an extension was given to the Petitioner, to answer the Request for Admissions and Interrogatories, to September 25, 1987.

On October 26, 1987, the Answers to Request for Admissions and Interrogatories were received by Respondent's attorney. Respondent filed a Motion for Discovery Conference or in the alternative Motion to Compel on November 20, 1987. This motion was granted on December 16, 1987.

Respondent filed a motion to dismiss for failure to prosecute on April 25, 1988 and Petitioner filed a motion for summary judgment on the same date.

Judge James Battin stayed the proceedings in this case on May 13, 1988.

The Petitioner served on the Respondent their Amended Answers to Interrogatories on September 7, 1988.

All of the motions were heard before the court on September 8, 1988.

The deadline for a motion for reconsideration was December 19, 1988. Petitioner filed their motion on December 16, 1988 and was granted a hearing on March 10, 1989.

Sanctions were imposed by Judge James Battin after the hearing on September 8, 1988 and re-affirmed by the Court after the hearing on March 10, 1989.

From these Orders, this appeal is taken on the grounds that the sanctions imposed are excessive and deprive the Petitioner of his property without due process of law.

We submit that an examination of the record and the law applicable bears out

Petitioner's position and the case should be reversed and remanded.

## REASONS FOR GRANTING THE WRIT

In affirming the court below, the Ninth Circuit Court of Appeals relies on their interpretation of the case of Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987), and ignores the duty, expressed in Malone, of the lower court to warn counsel before imposing drastic sanctions.

The decision of the Court of Appeals should be reviewed because it is in conflict with other decisions rendered by them prior to and after the decision in the Malone case. Under the facts in this case, it is readily apparent that the decision of the Court of Appeals deprives the Petitioner of his property without due process of law.

An examination of the record and the

interrogatories in question which are an attempt to re-litigate the state court case shows no sanctions of any kind were in order.

The record briefly set forth above, shows the Respondent was not injured in any way and suffered very little inconveniences, if any.

The Ninth Circuit Court of Appeals has cited in Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987) as authority for their opinion.

In this approach the Court of Appeals ignores the fact situation in Malone in comparison to the instant case.

In Malone her attorney notified the Government that he would not comply with the order. Malone willfully failed to comply with the pre-trial order after the Government had put in a large amount of work and money in their effort to comply.

That is not the situation in this case.

See brief statement of the case.

The criteria established in Malone was adopted by the Ninth Circuit Court of Appeals in the later case of U.S. For Use of Wiltec Guam v. Kahaluu Construction, 857 F.2d 600 (9th Cir. 1988):

"[3]In addition, we have identified five factors that a district court must weigh in determining whether to dismiss a case as a punitive measure: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (citations omitted).... The district court need not make explicit findings regarding these factors; however, if it does not (as in this case), we review the record independently to determine whether the sanction was an abuse of discretion....
[4] Finally, we have held that the district court abuses its discretion if it imposes a dismissal sanction "without first considering the impact of the sanction and the adequacy of less drastic sanctions." Malone, 833 F.2d at 131 (quoting United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986). As a general rule, the district court must consider less severe alternatives and dismiss them if it elects to dismiss.....

In other words, the district court is generally required to dismiss alternative sanctions; but in exceptional cases, where it is clear that no other alternative would have been reasonable, we may affirm a dismissal or default judgment despite the absence of such a discussion....An explicit warning is not always required, at least in a case involving "egregious circumstances"....In other circumstances, the failure to warn may place the district court's order in serious jeopardy. "Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal."...In short, the record indicates no consideration by the district court of the adequacy of lesser sanctions and no warning to the defendants that judgment might be awarded for Wiltec."

U.S. For Use of Wiltec Guam v. Kahaluu Construction, 857 F.2d 600, 603-605 (9th Cir. 1988).

We respectfully submit that in sustaining the lower court in this case, the Ninth Circuit Court of Appeals has departed from all previous decisions of the Ninth Circuit Court and has granted a district court the right to abuse its discretion to punish counsel for real or imagined abuses to the detriment of the client.

Some of the cases that the Ninth Circuit

Court of Appeals has decided are as follows:

People of Territory of Guam v. Reyes, 800 F.2d 940 (9th Cir. 1986);

United States v. National Medical Enterprises, Inc., 792 F.2d 906 (9th Cir. 1986);

Wyle v. R.J. Reynolds, Inc., 709 F.2d 585 (9th Cir. 1983);

Raiford v. Pounds, 640 F.2d 944 (9th Cir. 1981);

Falstaff Brewing Corporation vs. Miller Brewing Company, 702 F.2d 770 (9th Cir. 1983);

Toth v. Trans World Airlines, Inc., 862 F.2d 1381 (9th Cir. 1988).

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# A P P E N D I X

## EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

| | |
|---|---|
| CHARLES B. CARROLL,<br><br>Plaintiff,<br><br>vs.<br><br>INSURANCE COMPANY OF NORTH AMERICA,<br><br>Defendant. | No. CV-87-74-BLG -JFB |
| INSURANCE COMPANY OF NORTH AMERICA,<br><br>Third-Party Plaintiff,<br>vs.<br><br>BOSS COMMERCIAL CONSTRUCTION, BOSS CONSTRUCTION COMPANY, CORNER POCKETS OF AMERICA, INC., MONTANA BILLIARD SUPPLY, TRIANGLE MANAGEMENT CORPORATION and GEORGE FRANK, individually and in capacity as owner, director officer thereof, | **MEMORANDUM OPINION AND ORDER** |

Third-Party Defendants. )

Presently pending before the Court is defendant's Motion to Dismiss. For the reasons stated below, defendant's motion is granted, pursuant to Rule 37(b)(2)(C), and defendant's Counterclaim and Third-Party Complaint are dismissed as moot.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff filed this action on March 19, 1987, seeking a declaration that he is entitled to coverage for a judgment obtained by him in state court against his former employer, under an insurance policy issued by defendant to his former employer, third-party defendant Boss Commerical Construction (Boss). In the underlying action, plaintiff asserted a wrongful termination claim against Boss and other named insureds which was resolved when Boss confessed judgment in the amount of $125,000. Judgment was entered accordingly on

January 22, 1987.

Defendant in the present action served plaintiff with written discovery on July 27, 1987. Responses were not served within the 30-day time period allowed under Rule 33, Fed.R.Civ.P. At a preliminary pretrial conference held on September 23, 1987, defendant evidenced an intent to move for summary judgment upon completion of discovery. A scheduling order issued pursuant to the preliminary pretrial conference set a discovery deadline of April 18, 1988, and specifically directed that all answers to interrogatories be made by that date. See Memorandum of Preliminary Pretrial Conference and Order, Para. 7 (Sept. 23, 1987).

Plaintiff responded to defendant's July discovery requests on October 26, 1987. Defendant believed that the responses were inadequate and evasive, and on November 12,

1987 wrote to plaintiff's counsel urging more complete responses to the discovery. When further responses were not received, defendant filed a Motion to Compel on November 23, 1987, which was granted without opposition on December 16, 1987. Despite the Order of this Court directing that plaintiff provide full and complete responses, plaintiff still had not responded to defendant's discovery requests when the April 18, 1988 discovery deadline rolled around. However, plaintiff did on that date submit its own discovery requests to defendant. Those discovery requests were followed on April 25, 1988 by plaintiff's Motion for Summary Judgment.

Defendant now seeks dismissal of plaintiff's action, pursuant to Rule 41(b), Fed.R.Civ.P., for failure to prosecute. This motion is based on the fact that plaintiff, in violation of two Court Orders, has failed to

respond to legitimate discovery requests and that such failure has prejudiced defendant in that defendant has been unable to move for summary judgment without the necessary factual support for its motion.

Plaintiff did not file a brief in opposition to defendant's motion, but appeared at oral argument and resisted dismissal, contending that the factual information sought by defendant related to issues which had been resolved in the prior judicial proceedings, and that because of res judicata defendant could not relitigate those issues in the present proceedings. Plaintiff pointed out that the Motion to Compel issued by this Court in December 1987 was a summary ruling based on plaintiff's failure to file a response brief, and was not issued on the merits.

DISCUSSION

Although defendant's motion is denominated

as one for dismissal under Rule 41(b), for failure to prosecute, the Court believes that it is more accurately characterized as one for dismissal as a sanction under Rule 37(b)(2)(C), since the request is related to a failure to respond to discovery. See, Societe Internationale v. Rogers, 357 U.S. 197, 206-207 (1958); see generally 10 Fed.C.Proc, L.Ed. Sec. 26:352.

Rule 37(b)(2)(C) provides that where a party has failed to obey an order to provide discovery, the Court may dismiss the action. Dismissal with prejudice is a harsh remedy, however, and should be used only in extreme situations, where the failure to comply is due to willfulness, bad faith or fault of the party. United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1270 (9th Cir. 1985) (quoting Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir.

1983)). The sanction of dismissal is reviewable for an abuse of discretion, and will not be reversed "absent a definite and firm conviction that a clear error of judgment was made by the Court below." Id. (citing Munoz-Santana vs. INS, 742 F.2d 561, 564 (9th Cir. 1984)).

In the present case, plaintiff has completely failed to comply with defendant's legitimate discovery requests, despite defendant's urging and two Orders of this Court compelling him to do so. Plaintiff does not contend that his failure to respond to discovery was anything but intentional or willful, but instead offers two excuses for his non-compliance.

First, plaintiff contends that defendant is attempting to relitigate factual issues which were resolved in the earlier state court proceedings, and states that in ignoring

defendant's discovery requests, he has simply refused to relitigate the state court matters. Regardless of the merits of plaintiff's claim that the doctrine of res judicata bars relitigation of certain factual issues raised herein, that question is for this court to decided, not plaintiff. Plaintiff's own position with respect to the merits of that argument do not relieve him of the obligation to respond to legitimate discovery requests, especially in face of this Court's Order compelling responses. Plaintiff's first reason for non-compliance is therefore not well taken.

Second, plaintiff's counsel attempts to minimize the impact of this Court's Order of December 16, 1987 compelling responses, arguing that it was issued summarily under Local Rule 220-1, based upon plaintiff's failure to file a brief in response to

defendant's Motion to Compel. However, the fact that a motion is summarily granted pursuant to local rule does not lessen the enforceability or authority of that order. Plaintiff has not moved for an extension of time within which to respond to defendant's discovery requests, nor did he otherwise seek to invoke the protective powers of the Court before unilaterally deciding that responses were not necessary. This complete and willful failure to provide discovery responses has been extremely prejudicial to defendant, since its ability to move for summary judgment has been hampered by the lack of a factual foundation upon which to base its argument. To add insult to injury, <u>after</u> expiration of the discovery deadline, plaintiff filed its own Motion for Summary Judgment to which plaintiff is equally unable to respond. Plaintiff's flagrant disregard of the Rules of

Procedure and orders of this Court, combined with the serious prejudice resulting to defendant from its delay and contumacious conduct, convince the Court that dismissal is an appropriate sanction. See Rubin v Belo Broadcasting Corp., 769 F.2d 611, 617-18 (9th Cir. 1985) (degree of prejudice to opposing party is an important factor in determining the severity of the sanction imposed). The Court also notes that plaintiff's conduct has deprived other litigants of the use of the Court's time, an important consideration in this era of over-crowded dockets. See G-K Properties v. Redevelopment Agency of San Jose, 577 F.2d 645, 647 (9th Cir. 1978).

The Court is mindful that it must consider the suitability of lesser sanctions before applying the extreme sanction of dismissal. Rubin, 769 F.2d at 617. Having so done, and in light of the ineffectiveness of prior

orders and plaintiff's apparent tendency to operate outside the rules and procedures of the Court, the court does not believe that a lesser sanction will accomplish the goals of penalizing plaintiffs for his willful and deliberate conduct and deterring those who might be tempted to engage in similar conduct. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976); G-K Properties, 577 F.2d at 647.

Finally, plaintiff had ample opportunity to be heard on this motion and certainly was aware that a failure to comply with the discovery rules and orders of this Court could result in dismissal. Dismissal of the complaint will therefore not deprive plaintiff of due process. See Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, n. 11 (9th Cir. 1983)(citing Roadway Express v. Piper, 447 U.S. 752, 767 (1979).

Based on the foregoing,

IT IS ORDERED that defendant's Motion to Dismiss be and is hereby granted, and that plaintiff's Complaint is dismissed, with prejudice.

IT IS FURTHER ORDERED that defendant's Counterclaim and Third-Party Complaint are dismissed as moot.

The Clerk is directed to enter judgment accordingly.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this Order.

Done and Dated this 8th day of December, 1988.

James F. Battin
United States District Judge

Filed: December 8, 1988
Lou Aleksich, Jr. Clerk

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IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF MONTANA

BILLINGS DIVISION

| | |
|---|---|
| CHARLES B. CARROLL,<br><br>Plaintiff,<br>vs.<br><br>INSURANCE COMPANY OF NORTH AMERICA, | No. CV-87--74-BLG JFB |
| INSURANCE COMPANY OF NORTH AMERICA,<br><br>Third-Party Plaintiff,<br>vs.<br><br>BOSS COMMERCIAL CONSTRUCTION, BOSS CONSTRUCTION COMPANY, CORNER POCKETS OF AMERICA,INC, MONTANA BILLIARD SUPPLY, TRIANGLE MANAGEMENT CORPORATION, and GEORGE FRANK, individually and in capacity as owner, director officer thereof,<br><br>Third-Party Defendants. | |

**MOTION FOR RECONSIDERATION**

Plaintiff, Charles B. Carroll, by his attorney, hereby moves the Court for

reconsideration of its Order dated December 8, 1988, granting the Defendant's Motion to Dismiss and dismissing the Plaintiff's Complaint.

This Motion for Reconsideration is made pursuant to Rule 7 and Rules 37(b) of the Federal Rules of Civil Procedure; the grounds in support of this Motion are set forth in the Memorandum filed herewith.

WHEREFORE, Plaintiff respectfully requests that his Motion for Reconsideration be granted.

DATED this 19th day of December, 1988.

HENNESSEY LAW OFFICE

s/Joseph P. Hennessey

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IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF MONTANA

BILLINGS DIVISION

CHARLES B. CARROLL, )

| | | |
|---|---|---|
| Plaintiff, | ) | |
| vs. | ) | |
| INSURANCE COMPANY OF NORTH AMERICA, | ) | No. CV-87-74-BLG JFB |
| Third-Party Plaintiff, | ) | |
| vs. | ) | |
| BOSS COMMERCIAL CONSTRUCTION, BOSS CONSTRUCTION COMPANY, CORNER POCKETS OF AMERICA, INC, MONTANA BILLIARD SUPPLY, TRIANGLE MANAGEMENT CORPORATION, and GEORGE FRANK, individually and in capacity as owner, director officer thereof, | ) | |
| Third-Party Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF**

**MOTION FOR RECONSIDERATION**

Plaintiff, Charles B. Carroll, by and through his attorney, respectfully moves the Court for reconsideration of its Order dated December 8, 1988, granting the Defendant's Motion to Dismiss and dismissing the Plaintiff's Complaint.

Plaintiff now moves the Court to reconsider its Order of December 8, 1988. Rule 37(b)(2) F.R.C.P. provides in pertinent part, as follows:

(2) Sanctions by Court in Which Action is Pending.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party files to obey an order entered until Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (Emphasis added.)

The Ninth Circuit Court states as follows in Wyle v R.J. Reynolds Industries Inc., 709 F.2d 585 (1983):

> [1] Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court orders enforcing those rules. National Hockey League v. Metropolitan Hockey Club, Inc. 427 U.S. 639, 96 S.Ct. 2278, 49 L.Ed.2d 747 (1976); United States v. Sumitomo Marine & Fire Insurance Co., 617 F.2d 1365, 1369 (9th Cir. 1980). When choosing among possible sanctions, the district court may consider the deterrent value of an order of dismissal on future litigants as well as on the parties. National Hockey League, 427 U.S. at 642-43, 96 S.Ct. 2780-81. [3] Additionally, courts have inherent power to dismiss an action which a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice. Phoceene Sous-Marine, S.A. vs. U.S. Phosmarine, Inc., 628 F.2d 802, 806 (9th Cir. 1982). [4,5] The requirements of due process limit the court's exercise of its inherent power. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-54, 29 S.Ct. 370, 379-81, 53 L.Ed. 530 (1909); Phoceene Sous-Marine, 682 F.2d at 806. Dismissal is a permissible sanction only when the deception relates to the matters in controversy, and because dismissal is so harsh a penalty, it should be imposed only in extreme circumstances. Raiford v. Pounds, 640 F.2d

944, 945 (9th Cir. 1981).

We respectfully point out to the court that all orders of the Court were followed prior to the hearing, although late. We apologize to the Court for this tardiness but feel that in view of all the circumstances this is excusable neglect.

We also wish to point out that all matters sought to be ascertained by the interrogatories in question were in the possession of the Defendant insurance company long before his hearing and had been covered in the number of hearings in the District Court for the Thirteenth Judicial District, prior to the entry of judgment.

10 Fed.Proc., L.Ed. Seciton 26:352. Sanctions - reads as follows:

A court is authorized under FRCP 37(a)(4) to award the costs of a motion to compel answers to interrogatories. There is authority that if answers to interrogatories are served before the court issues its order compelling discovery, FRCP 37(a)(4) does not afford a basis for awarding costs, since that

provision authorizes an award of costs incurred in obtaining an order compelling discovery. A complete failure to answer interrogatories may subject the interrogated party to sanctions under FRCP 37(d), and a failure to act as described in that subdivision may not be excused on the ground that the discovery sought is objectional, unless the party failing to act has applied for a protective order as provided for by FRCP 26(c). FRCP 37(d) requires the court to award reasonable expenses, including attorney's fees, caused by the failure to serve timely answers to interrogatories unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

10 Fed. Proc.L.Ed. Section 26:507. Purpose of sanctions; discretion in imposing - reads in pertinent part:

When imposing sanctions, a court should consider the totality of circumstances surrounding a failure to make discovery and should be mindful of the requirements of the due process clause of the Fifth Amendment. Although a court should impose sanctions no

more drastic than those actually required to protect the rights of other parties, overly lenient sanctions are to be avoided where inadequate protection of the discovery process results. In imposing a sanction, a District Court should clearly state its reason for its action so that meaningful review may be had on appeal.

Section 26:508 reads as follows:

A court may assess against an attorney expenses incurred by discovering parties in obtaining a discovery order, expenses incurred as a result of the attorney's clients' failure to comply with a discovery order, or expenses which resulted from the failure of the attorney's clients to perform any of the acts of discovery set out in subsection (d) of FRCP 37. In fact, where the court determines that a failure to make discovery is the fault of the attorney rather than that of the client, its order may stipulate that sanctions be imposed upon the attorney only. Courts are reluctant to penalize a party by dismissing an action or entering a default judgment where the basis of such a sanction is the negligence of the attorney in failing to comply with an order of the court, and may investigate the possibility of imposing less dramatic sanctions in such a case. On the other hand, it has been pointed out that a party is responsible for the actions and conduct of his counsel and that, under appropriate circumstances, dismissal or default may be entered against the party under FRCP 37(b)(2)(C) as a result of counsel's actions. A party may also be held in contempt under FRCP 37(b)(2)(D) for

noncompliance with a protective order, even though that party's attorneys may have been responsible for such noncompliance.

We respectfully submit that the Cross-Claim and Third Party Complaint is an attempt to relitigate the entire case and that the sole question before the Court was and is the coverage furnished by Insurance Company of North America.

Respectfully submitted this 19th day of December, 1988.

HENNESSEY LAW OFFICE

s/Joseph P. Hennessey

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

| | | |
|---|---|---|
| CHARLES B. CARROLL, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| | ) | |
| INSURANCE COMPANY OF NORTH AMERICA, | ) | No. CV-87-74-BLG JFB |

INSURANCE COMPANY OF NORTH AMERICA,

Third-Party Plaintiff,

vs.

BOSS COMMERCIAL CONSTRUCTION, BOSS CONSTRUCTION COMPANY, CORNER POCKETS OF AMERICA,INC, MONTANA BILLIARD SUPPLY, TRIANGLE MANAGEMENT CORPORATION, and GEORGE FRANK, individually and in capacity as owner, director officer thereof,

Third-Party Defendants.

**MEMORANDUM AND ORDER**

Presently pending before the Court is plaintiff's Motion for Reconsideration of this Court's Memorandum Opinion and Order of December 8, 1988, dismissing plaintiff's complaint. For the reasons stated below, plaintiff's Motion for Reconsideration is denied.

FACTS AND PROCEDURAL BACKGROUND

On December 8, 1988, this Court dismissed plaintiff's complaint in the above captioned matter, as a sanction under Rule 37(b)(2)(C),

based upon plaintiff's willful and flagrant disregard of the Rules of Civil Procedure and Orders of this Court. Plaintiff's conduct during pretrial discovery in this case resulted in serious prejudice to defendant in its attempts to litigate the matter.

Plaintiff moves for reconsideration of the dismissal, essentially arguing that dismissal is an unduly harsh sanction and offering additional justification for his failure to comply with the Rules of Procedure and orders of this Court.

A motion for reconsideration of a judgment may be brought pursuant to Rule 59(e) or Rule 60(b), Fed.R.Civ.P. Lewis v. United States Postal Service, 840 F.2d 712, 713 n.1 (9th Cir. 1988). Because defendant did not attempt to show extraordinary circumstances or any grounds for relief specified in Rule 60(b), this Court will treat the motion as if it were

filed pursuant to Rule 59(e). Courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. All Hawaii Tours vs. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Hawaii 1987). Plaintiff appears to rely upon the third ground for reconsideration in the present motion.

A motion for reconsideration must demonstrate why the Court should reconsider its prior decision by setting forth facts or law in a strongly convincing nature. Id., at 649. A motion for reconsideration may be brought on the basis of judicial mistakes, as well as mistakes of a party or his counsel. Id. (citing Liberty Mutual Insurance Co. vs. E.E.O.C., 691 F.2d 438, 441 (9th Cir. 1982).

"However, a motion for reconsideration that presents no arguments that have not already been raised in opposition to to summary judgment should be denied." Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985).

Apply those standards, the Court finds that the present motion must be denied. The Court previously considered the suitability of lesser sanctions, and determined that none would accomplish the desired goals. Further, plaintiff offered similar excuses and arguments in opposition to defendant's prior motion, and they were considered and rejected by the Court in ruling upon defendant's Motion to Dismiss. Any new arguments advanced by plaintiff upon reconsideration are not sufficiently convincing to justify reconsideration. The Court will not allow plaintiff to remedy its previous failure to brief the issues by raising new arguments for

the first time upon reconsideration. See, All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. at 650 (citing Publishers Resource v. Walker-Davis Publications, 762 F.2d 557, 561 (7th Cir. 1985); see also Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988).

A motion for reconsideration is not properly viewed as an alternative to appeal of an unfavorable decision, and the Court discourages attempts by counsel to employ it as such. Accordingly,

IT IS ORDERED that plaintiff's Motion for Reconsideration be and is hereby denied.

The Clerk is direct forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 20th day of April.

James F. Battin
Chief Judge

Filed: April 20, 1989
Lou Aleksich Jr., Clerk
Sandra L. Studiner, Deputy Clerk

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CHARLES B. CARROLL, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 89-35382 |
| | ) | |
| vs. | ) | D.C. No. |
| | ) | CV-87-74-JFB |
| INSURANCE COMPANY OF NORTH AMERICA, | ) | |
| | ) | **MEMORANDUM*** |
| | ) | |
| Defendant-Appellee. | ) | |

Appeal from the United States District Court
for the District of Montana
District Judge James F. Battin, Presiding

Submitted** June 25, 1990
Before: WRIGHT, FARRIS and NOONAN, Circuit Judges.

Carroll appeals the district court's dismissal of his complaint.

A district court considers five factors to determine whether dismissal is appropriate:

(1) the public's interest in expeditious

resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of lessd rastic sanctions. It is not necessary for a district court to make explicit findings to show that it has considered these factors.

Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987).

We review for abuse of discretion and will reverse a dismissal with prejudice only if it is obviously "outside the acceptable range of sanctions." Id.

We affirm for the reasons given by the district court in its Memorandum Opinion and Order of December 8, 1988. See Appendix.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
**The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

Filed: August 16, 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals
APPENDIX mentioned in above Memorandum is a copy of the MEMORANDUM AND ORDER filed April

20, 1989 in United States District Court, Case No. CV-87-74-BLG-JFB.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CHARLES B. CARROLL, | ) | |
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| Plaintiff-Appellant, | ) | No. 89-35382 |
| | ) | |
| vs. | ) | D.C. No. |
| | ) | CV-87-74-JFB |
| INSURANCE COMPANY OF NORTH AMERICA, | ) | |
| | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

**PETITION FOR REHEARING**

INTRODUCTION

COMES NOW Charles B. Carroll, the Plaintiff-Appellant in this case and respectfully petitions for a rehearing.

It is the opinion of counsel that the Court overlooked material facts in rendering its opinion and that the Court is in conflict with other opinions of the Court on the severity of sanctions that can be imposed by a

District Court Judge.

This rehearing should be granted to maintain uniformity in the decisions of this Court.

## BRIEF RESTATEMENT OF FACTS

This case involves an action for enforcement of a Judgment entered in state district court in Montana in favor of Appellant Charles Carroll. Appellee Insurance Company of North America denied liability on the coverage of the Judgment. The amount of Judgment involved in One Hundred Twenty-Five Thousand Dollars ($125,000.00).

This appeal specifically concerns the district court's dismissal of the Complaint and whether the sanctions imposed, under Rule 37 of the Federal Rules of Civil Procedure, are excessive and deprive the Appellant of his property without due process of law.

On March 18, 1987 Appellant Charles

Carroll filed a complaint seeking to enforce payment through insurance coverage of the Confession of Judgment entered into on January 22, 1987 in state district court.

The Appellee Insurance Company of North America filed its Answer on June 23, 1987. On July 27, 1987 Appellee filed Interrogatories to the Plaintiff with Answers due on August 26, 1987. By stipulation between the parties, an extension was given to the Appellant, to answer the Request for Admissions and Interrogatories, to September 25, 1987.

On October 26, 1987 the Answers to Request for Admissions and Interrogatories were received by Appellee's attorney. Appellee filed a Motion for Discovery Conference or in the alternative Motion to Compel on November 20, 1987. This motion was granted on December 16, 1987.

Appellee filed a motion to dismiss for

failure to prosecute on April 25, 1988 and Appellant filed a motion for summary judgment on the same date.

Judge James Battin stayed the proceedings in this case on May 13, 1988.

The Appellant served on the Appellee their Amended Answers to Interrogatories on September 7, 1988.

All of the motions were heard before the court on September 8, 1988.

The deadline for a motion for reconsideration was December 19, 1988. Appellant filed their motion on December 16, 1988 and were granted a hearing on March 10, 1989.

Sanctions were imposed by Judge Battin after the hearing on September 8, 1988 and re-affirmed by the Court after the hearing on March 10, 1989.

From these Orders, this appeal is taken on

the grounds that the sanctions imposed are excessive and deprives the Appellant of his property without due process of law.

We submit that an examination of the record and the law applicable bears out Appellant's position and the case should be reversed and remanded.

## ARGUMENT

### UNDER THE FACTS IN THIS CASE AND THE RECORD IN DISTRICT COURT IT IS APPARENT THE SANCTIONS IMPOSED ARE EXCESSIVE.

An examination of the record and the interrogatories in question which are an attempt to re-litigate the state court case shows no sanctions of any kind were in order.

The record briefly set forth above shows the Defendant-Appellee was not injured in any way and suffered very little inconveniences, if any.

This Court has cited the holding in Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987) as authority for this opinion.

In this approach the Court completely ignores the fact situation in Malone inm comparison to the instant case.

In Malone her attorney notified the Government that he would not comply with the order. Malone willfully failed to comply with the pre-trial order after the Government had put in a large amount of work and money in their effort to comply.

That is not the situation in this case. See brief summary of fact.

The criteria established in Malone was adopted by this court in the later case of U.S. For Use of Wiltec Guam v. Kahaluu Construction, 857 F.2d 600 (9th Cir. 1988):

"[3] In addition, we have identified five

factors that a district court must weigh in determining whether to dismiss a case as a punitive measure: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (Citations omitted).... The district court need not make explicit findings regarind these factors; however, if it does not (as in this case), we review the record independently to determine whether the sanction was an abuse of discretion.... [4] Finally, we have held that the district court abuses its discretion if it imposes a dismissal sanction "without first considering the impact of the sanction and the adequacy of less drastic sanction." Malone, 833 F.2d at 131 (quoting United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986). As a general rule, the district court must consider less severe alternatives and dismiss them if it elects to dismiss....

In other words, the district court is generally required to dismiss alternative sanctions; but in exceptional cases, where it is clear that no other alternative would have been reasonable, we may affirm a dismissal or default judgment despite the absence of such a discussion.... An explicit warning is not always required, at least in a case involving "egregious circumstances"....In other circumstances, the failure to warn may place the district court's order in serious jeopardy. "Failure to warn has frequently been a contributing

factor in our decisions to reverse orders of dismissal."... In short, the record indicates no consideration by the district court of the adequacy of lesser sanctions and no warning to the defendants that judgment might be awarded for Wiltec." (emphasis added)

U.S. For Use of Wiltec Guam v. Kahaluu Construction, 857 F.2d 600, 603-605 (9th Cir. 1988).

We respectfully submit that in sustaining the lower court in this case, the panel has departed from all previous decisions of this court and have granted a district court the right to abuse its discretion to punish counsel for real or imagined abuses to the detriment of the client.

Some of the cases that this court on this question are as follows:

People of Territory of Guam v. Reyes, 800 F.2d 940 (9th Cir. 1986)

United States v. National Medical Enterprises, Inc., 792 F.2d 906 (9th Cir. 1986)

Wyle v. R.J. Reynolds, Inc., 709 F.2d 585

(1983)

Raiford v. Pounds, 640 F.2d 944 (1981)

Falstaff Brewing Corporation v. Miller Brewing Company, 702 F.2d 770 (1983)

Toth v. Trans World Airlines, Inc., 862 F.2d 1381 (9th Cir. 1988).

## CONCLUSION

Under the holdings of all previous applicable cases of this court and the record in this case, we respectfully submit that the case should be reversed and remanded to the district court for a trial on the merits.

The court might consider a hearing en banc under Federal Rules of Civil Procedure Rule 35 and Circuit Court Rule 35 because it is necessary to maintain uniformity in the decisions of this court.

Respectfully submitted this 27th day of August, 1990.

HENNESSEY LAW OFFICE RADOVICH LAW FIRM

s/Joseph P. Hennessey s/George T. Radovich

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CHARLES B. CARROLL, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 89-35382 |
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| vs. | ) | D.C. No. |
| | ) | CV-87-74-JFB |
| INSURANCE COMPANY OF NORTH AMERICA, | ) | |
| | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

**ORDER**

Before: WRIGHT, FARRIS and NOONAN, Circuit Judges.

The Petition for Rehearing, filed on August 29, 1990, has been considered and is DENIED.

Filed: September 11, 1990
NOT FOR PUBLICATION
Clerk, U.S. Court of Appeals

EXHIBIT B

857 Federal Reporter, 2d Series 600

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF WILTEC GUAM, INC.,

Plaintiff-Appellee,

v.

KAHALUU CONSTRUCTION CO., INC., AND INDUSTRIAL INDEMNITY CO.,

Defendants-Appellants.

Nos. 87-1862, 87-1863

United State Court of Appeals
Ninth Circuit.

Argued and Submitted April 6, 1988.
Decided Sept. 15, 1988.

Subcontractor filed complaint against government contractor and its surety under the Miller Act, alleging that contractor failed to pay for services and materials subcontractor provided under its contract. The United States District Court for the Territory of Guam, Cristobal C. Duenas, J., entered

judgment against contractor and surety, and they appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) counterclaim was properly dismissed as sanction for failure to provide discovery relating to counterclaim, and (2) order precluding defendants from defending against plaintiff's claim was too severe sanction for failure to appear at deposition and late, defective filing of pretrial documents.

Affirmed in part and reversed in part.

Wallace, Circuit Judge, concurred in result with opinion.

**1. Federal Civil Procedure - 1278, 1636**

Although failure to provide discovery relating to counterclaim warranted sanction of dismissal of counterclaim, it could not afford basis for order prohibiting defendants from defending against plaintiff's claim; any sanction for violation of order compelling

production of documents relating to counterclaim had to relate to the counterclaim. Fed.Rules Civ. Proc. Rule 37(b)(2), 28 U.S.C.A.

**2. Federal Civil Procedure - 1278, 1921**

Rule 11 violation and delayed notification of appearance of defendant's counsel could not be basis for sanction prohibiting defendants from defending against plaintiff's claim because neither violation involved failure to obey a discovery order or a pretrial scheduling order. Fed.Rules Civ. Proc. Rules 11, 37(b)(2), 28 U.S.C.A.

**3. Federal Courts - 813**

Although district court need not make explicit findings regarding factors that court must weigh in determining whether to dismiss case as a punitive measure, if it does not, Court of Appeals reviews record independently to determine whether the sanction was an abuse

of discretion.

**4. Federal Civil Procedure - 1741**

Generally, district court must consider less severe alternatives and discuss them if it elects to dismiss the case for procedural violations.

**5. Federal Civil Procedure - 1451, 1921**

Order precluding defendants from defending against plaintiff's claim was too severe a sanction for failure to appear at deposition and the late, defective filing of pretrial documents, considering that case was proceeding to trial on schedule, plaintiff was not prejudiced by defendants' violations, and district judge failed to warn defendants' counsel of the possibility of awarding judgment for plaintiff, or to consider the feasibiity of less drastic sanctions. Fed.Rules Civ. Proc. Rule 37(b)(2), 28 U.S.C.A.

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Russell H. Tansey, Agana, Guam, for defendant-appellant Kahaluu Const. Co., Inc.

Charles H. Witherwax, Honolulu, Hawaii, for defendant-appellant Indus. Indem. Co.

John C. Dierking, Agana, Guam, for plaintiff-appellee Wiltec Guam, Inc.

Appeal from the United States District Court for the Territory of Guam.

Before WALLACE, REINHARDT and NOONAN, Circuit Judges.

REINHARDT, Circuit Judge:

This appeal challenges sanctions imposed by the district court under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Following several violations of the rules of procedure by the appellant, the court prohibited them from defending against the appellee's claim, dismissed the counterclaim, and awarded judgment for the appellee. We

affirm in part and reverse in part.

FACTS AND PROCEDURAL SUMMARY

Defendant-appellant Kahaluu Construction Company, Inc. ("Kahaluu") entered into a contract with the United States Navy for the installation of sprinkler systems in several buildings at the Naval Ship Repair Facility on Guam. Defendant-appellant Industrial Indemnity Company ("Industrial"), as surety, executed a payment bond. Kahaluu then contracted with plaintiff-appellee Wiltec Guam, Inc. ("Wiltec") for the provision of materials, services, and supplies for use in the sprinkler installation project.

On April 4, 1986, Wiltec filed a complaint against Kahaluu and Industrial under the Miller Act, 40 U.S.C. Section 270a et. seq. (1982), alleging that Kahaluu failed to pay for services and materials Wiltec provided under its contract. Kahaluu and Industrial

filed a joint answer and Kahaluu also counterclaimed against Wiltec. Wiltec served a document production request, and a pretrial scheduling order was entered.

On October 31, 1986, Wiltec filed a motion for sanctions alleging that the defendants had violated the scheduling order and had failed to comply with the document production request. Wiltec asked that the allegations in its complaint be taken as established and that the defendants be precluded from opposing the complaint. A hearing on this motion was set for November 14. On November 7, the district court entered an order compelling production of the requested documents by November 12. The court also awarded sanctions to Wiltec in the amount of $300, based on the defendants' failure to comply with the request.[1]

On November 14, the court heard argument on Wiltec's motion for sanctions. Following

the hearing, the court found that the defendants had committed the following violations:

1. Wiltec's counsel was not timely informed of the appearance of Industrial's counsel.

2. No one appeared at the noticed deposition of Kahaluu.

3. The defendants filed their pretrial statement and memorandum of contentions of law and fact after the date set by the pretrial scheduling order. The memorandum also failed to comply with certain local rules.

4. The defendants failed to produce documents relating to Kahaluu's counterclaim against Wiltec, in violation of the order compelling production.

5. Industrial's counsel signed the defendants' opposition to the motion for sanctions on behalf of both Industrial and

Kahaluu, in violation of Rule 11 of the Federal Rules of Civil Procedure.

Based on these violations, the district court invoked Rule 37 of the Federal Rules of Civil Procedure and Local Rule 235-6, and issued an order declaring that all of the allegations in Wiltec's complaint were to be taken as established for purposes of the action and that Wiltec's claim would not be subject to opposition. The court also dismissed Kahaluu's counterclaim. Subsequently the court awarded judgment for Wiltec against Kahaluu in the amount of $101,394 and against Industrial jointly and severally with Kahaluu in the amount of $93,235.50.

Kahaluu and Industrial appealed from the district court's order. At oral argument before this court, the appellants conceded that Wiltec did not receive discovery

materials relating to Kahaluu's counterclaim, and withdrew their objection to the district court's dismissal of the counterclaim. We therefore affirm that part of the order. However, the appellants continue to contest the part of the order that prohibits them from defending against Wiltec's claim. They contend that this sanction is not authorized by the Federal Rules of Civil Procedure, that it constitutes an abuse of the district court's discretion, and that it violates the defendants' due process rights. We reverse this part of the district court's order.

DISCUSSION

Rule 37(b)(2) of the Federal Rules of Civil Procedure authorizes sanctions against a party who "fails to obey an order to provide or permit discovery" or who "fails to obey an order entered under Rule 26(f)"--that is, a discovery scheduling order. Fed.R.Civ.P.

37(b)(2). Such sanctions may include: "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order," 37(b)(2)(A); "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses," id. 37(b)(2)(B); or "[a]n order ... dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." id. 37(b)(2)(C).[2]

[1,2] In order to assess the district court's action, we must examine the five violations listed above. As the appellants now concede, the failure to provide discovery relating to Kahaluu's counterlciam was appropriately sanctions by dismissal of the

counterclaim. However, that failure cannot justify any additional sanction involving Wiltec's claim, becuase due process considerations require that the sanction be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 591 (9th Cir. 1983) (quoting Insurance Corp. of Ireland, Ltd, v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982)). Here, the order compelling production involved only documents relating to the counterclaim; therefore any sanction for violation of the order must also relate to the counterclaim; therefore any sanction for violation of the order must also relate to the counterclaim. Nor can the Rule 11 violation or the delayed notification of the appearance of Industrial's counsel be a

basis for the sanction, because Rule 37(b)(2) authorizes sanctions only for failure to obey a discovery order or a pretrial scheduling order. Therefore we are left with two violations: the failure to appear at the deposition of Kahaluu and the late and defective filing of pretrial documents.[3] In reviewing the sanction, the question is not whether we would have imposed a different sanction had we considered the matter originally, but whether the district court "exceeded the limits of its discretion." Halaco Engineering Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988); Wyle, 709 F.2d at 591.[4] We hold that it did.

Dismissal and default judgment are authorized only in "extreme circumstances." Fjelstad v. American Honda Motor Co. Inc., 762 F.2d 1334, 1338 (9th Cir. 1985).

So .too. are orders taking the plaintiff's

allegations as established and awarding judgment to the plaintiff on that basis.[5] While we cannot condone the defendants' conduct during the course of trial preparation, we have difficulty concluding that the violations that occurred here constitute "extreme circumstances." Moreover, in order to warrant imposition of these severe sanctions, the violation(s) must be "due to willfulness, bad faith, or fault of the party." Wyle, 709 F.2d at 589. The district court did not make any specific findings as to the appellants' willfulness or bad faith, stating only that the "failure to comply with th rules and to supply the required documents was not due to any inability on the part of the Defendants."

[3] In addition, we have identified five factors that a district court must weigh in determining whether to dismiss a case as a

punitive measure: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (quoting Thompson v. Housing Authority, 782 F.2d 829, 831 (9th Cir.), cert. denied. 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986)). The district court need not make explicit findings regarding these factors; however, if it does not (as in this case), we review the record independently to determine whether the sanction was an abuse of discretion. Id. Even assuming that the conduct of Kahaluu and Industrial meets the extreme circumstances and willfulness requirements, our review of the five Malone

factors leads us to conclude that in this case the sanction imposed by the district court was not within the "acceptable range." Id.

The first two factors--expeditious resolution of litigation and docket management--weigh in favor of the sanction, but not heavily. Wiltec filed its complaint in April 1986; the trial was set for November. At the hearing on the motion for sanctions, defendants' counsel expressed their willingness to comply with that schedule. At that point the defendants had filed thier pretiral documents, allowing Wiltec to go ahead with its own preparation. Thus the case was proceeding to trial in a timely fashion. By contrast, cases in which we have upheld orders of dismissal have often involved serious disruptions of the district court's trial schedule. See id. at 131; Thompson, 782

F.2d at 832 (pretrial conference continued three times).

The third factor, prejudice, looks to whether the appellants' actions impaired Wiltec's ability to go to trial or threatened to interfere with the rightful decision of the case. Malone, 833 F.2d at 131. There is no indication that the defendants' violations in any way threatened to distort the resolution of Wiltec's claim. Kahaluu's deposition, while delayed, was in fact taken before the motion for sanctions was heard. Moreover, at that point the defendants' pretrial documents had been filed; the violation of the local rules with respect to the memorandum of contentions of law and fact related to an element of counterclaim, not to Wiltec's claim. Thus the defendants' violations, while they certainly caused serious inconvenience for Wiltec, did not prejudice the outcome of

Wiltec's action. See Mir v. Fosburg, 706 F.2d 916, 919 & n.2 (9th Cir. 1983) (delay alone does not necessitate dismissal). Because there is no evidence of actual prejudice, the third factor does not support the sanction. The fourth factor, the policy favoring disposition on the merits, clearly weighs against the sanction.

[4] Finally, we have held that the district court abuses its discretion if it imposes a dismissal sanction "without first considering the impact of the sanction and the adequacy of less drastic sanctions." Malone, 833 F.2d at 131 (quoting United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986)). As a general rule, the district court must consider less severe alternatives and discuss them if it elects to dismiss. Halaco, 843 F.2d at 381. In Malone, we said that explicit discussion of

alternatives is preferred, but held that under "egregious circumstances" such discussion is not always necessary. 833 F.2d at 132. In other words, the district court is generally required to discuss alternative sanctions; but in exceptional cases, where it is clear that no other alternative would have been reasonable, we may affirm a dismissal or default judgment despite the absence of such a discussion. See Halaco, 843 F.2d at 381 ("the consideration of less severe penalties must be a reasonable explanation of possible and meaningful alternatives"); Malone, 833 F.2d at 132; Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 500 (9th Cir. 1987) ("meaningful alternatives must be explored"); Anderson v. Air West, Inc., 542 F.2d 522, 525 (9th Cir. 1976) ("reasonable exploration of possible and meaningful alternatives" is required, although it is not necessary that every possible

alternative be examined).

We have reviewed the record in this case, including the transcript of the hearing on the motion for sanctions, and have found no indication that the district judge discussed the feasibility of less drastic sanctions or explained why alternative sanctions would be inadequate. Moreover, we do not believe this fits into the narrow exception established by Malone. The district court was at fault for not explicitly weighing alternatives before entering its order.

In some cases, the fact that the district court actually implemented alternative sanctions prior to dismissal may be enough to satisfy the "consideration of alternatives" requirement. Malone, 833 F.2d at 132. In Malone, for example, the court declared a mistrial and then entered a pretrial order before dismissing the action; these measures

"were all instituted in response to the lack of preparation on the part of Malone and her counsel." Id. (emphasis in original). This series of sanctions thus constituted a natural progression, much like progressive discipline, with dismissal the last step. Here, the judge did award a $300 sanction for failing to comply with the document production request. Thus it could be said that he followed the Malone formula in dismissing the counterclaim.

But such a conclusion in relation to the counterclaim does not indicate that he weighed less severe sanctions for the defendants' other violations before precluding them from opposing Wiltec's claim. There was no natural progression with respect to that claim, and nothing in the record--at the time of either the first or second sanction--leads us to believe that less severe alternatives were contemplated before the court awarded judgment

for Wiltec.

In addressing the fifth Malone factor, we also look to whether the district court warned of the possibility of dismissal. Malone, 833 F.2d at 132. An explicit warning is not always required, at least in a case involving "egregious circumstances." Id. at 132-33. In other circumstances, the failure to warn may place the district court's order in serious jeopardy. "Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal." Id. at 133 (citing case). In this case, the record indicates that the district court never warned the defendants explicitly or implicitly that their procedural lapses might result in a judgment against them. See Hamilton, 811 F.2d at 500 (district judge had obligation to warn plaintiff that dismissal was imminent); Mir, 706 F.2d at 919 (district court failed to warn

plaintiff that inaction risked dismissal of suit). In short, the record indicates no consideration by the district court of the adequacy of lesser sanctions and no warning to the defendants that judgment might be awarded for Wiltec. The fifth factor therefore weighs heavily against the sanction.

[5] By precluding Kahaluu and Industrial from defending against Wiltec's claim, the district court in effect deprived them of all of their rights as to Wiltec's action. This harsh a penalty was not warranted. Despite the defendants' lax attitude toward the rules of civil procedure and the pretrial timetable, the case was proceeding to trial on schedule. Wiltec was not prejudiced by the defendants' violations. Most important, the district judge failed both to warn the defendants' counsel of the possibility of awarding judgment for Wiltec and to consider the

feasibility of less drastic sanctions. The judge's "undestandable pique" at defense counsel's lapses cannot excuse his failure to consider alternative sanctions, Hamilton, 811 F.2d at 500; nor can it overcome the strong policy favoring disposition of cases on their merits. Under the circumstances, the order precluding Kahaluu and Industrial from defending against Wiltec's complaint was an abuse of the district court's discretion.

## CONCLUSION

The part of the district court's order dismissing Kahaluu's counterclaim is affirmed. The part taking all of the allegations in the complaint as established and precluding the defendants from opposing Wiltec's claim is reversed. The judgment for Wiltec is vacated and the action is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

WALLACE, Circuit Judge, concurring:

I concur in the result. I write separately because I have reservations about the majority's analysis of the fifth factor under Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987) (Malone): whether the district court need consider the availability of less drastic alternatives. Id. at 130-32.

The majority reads Malone as generally requiring the district court "to discuss alternative sanctions; but in exceptional cases, where it is clear that no other alternative would have been reasonable, we may affirm a dismissal or default judgment despite the absence of a discussion." Maj.op. at 604. Malone, however, stated a different proposition: "we have never held that explicit

discussion of alternatives is necessary for an order of dismissal to be upheld." Malone, 833 F.2d at 132 (emphasis in original). Malone then held it would not require the district court to discuss alternatives where a court order is "purposefully and defiantly violated." Id. Rather than analyzing whether Kahaluu purposefully and defiantly violated the court's order, the majority concludes that this case does not fit into the narrow "egregious circumstances" exception established by Malone. The district court erred, so the majority reasons, in failing to weigh explicitly less drastic alternatives. Maj. op. at 604. It is unclear whether the majority's analysis will allow a "purposeful and defiant violation of a court order" to fit within the egregious circumstances exception, but it is clear that such was the egregious circumstance at issue in Malone. See Malone,

833 F.2d at 132. To be consistent with Malone, I would go no farther than stating our court has "indicated a preference for explicit discussion by the district court of the feasibility of alternatives...[but] we have never held explicit discussions of alternatives is necessary...." Id. (emphasis in original).

The majority then concludes that "the fact that the district court actually implemented alternative sanctions prior to dismissal may be enough to satisfy the 'consideration of alternatives' requirement" if these sanctions constitute a "natural progression" with dismissal as the last step. Here is a new test established by the majority. Under this new test, it is unclear what may serve as a "natural progression" of sanctions culminating in a dismissal order sufficient to satisfy the "consideration of alternatives" requirement.

Does it require more than one prior sanction to be a "natural progression"? The majority cites no authority for its new requirement. Instead of introducing this new and uncertain notion of a "natural progression," I would simply follow the language in Malone: "explicit discussion of alternatives is unnecessary if the district court actually tried alternatives before employing the ultimate sanction of dismissal." Id.

The majority holds that the district court's first steps--the imposition of the order compelling discovery and the $300 sanction for failing to comply with the document production request in this case--did not indicate such a "natural progression" as to Wiltec's claim. Maj. op. at 604-605. I believe the order compelling discovery and the payment of a $300 sanction fits within this definition even though it related to documents

necessary to defend against the counterclaim and not documents necessary to prosecute the Wiltec claim. The district court's order put a defiant part on notice that the court is unwilling to tolerate improper conduct. It seems to me this kind of order should be factored into determining whether a party has received proper warning. In Malone, the prior court acts "were all instituted in response to the lack of preparation on the part of Malone and her counsel." Malone, 833 F.2d at 132. Although I can agree this act of the court may have been insufficient alone, I disagree it may not be considered.

Finally, I observe that on remand imposing some lesser sanction would not be inconsistent with the majority opinion.

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[1] The appellants do not challenge the award of monetary sanctions.

[2] The district court also cited Local Rule 235-6, which states only that the failure of a party or attorney to participate in good faith in the framing of a proposed scheduling order "may result in the imposition of appropriate sanctions." Guam L.R. 235-6. Because the violations occurred after the scheduling order was entered, this rule is not applicable.

[3] The appellants assert that Rule 37(g), rather than Rule 37(b), governs the imposition of sanctions in this case, and point out that Rule 37(g) authorizes only monetary sanctions. However, Rule 37(g) applies only to failure to participate in good faith in the framing of a discovery plan. Because the pretrial scheduling order was entered before the defendants committed their discovery violations, Rule 37(b) rather than Rule 37(g) was the appropriate rule. Therefore we reject appellant's argument that the rules did not authorize non-monetary sanctions for the types of violations involved here.

[4] "We review sanctions imposed by a district court for abuse of discretion and will not reverse absent a definite and firm conviction that the district court made a clear error of judgment." Halaco, 843 F.2d at 379.

[5] Most of our recent Rule 37 cases have involved dismissal of the plaintiff's action, rather than orders of the type involved here. We believe these sanctions are comparable in that they represent the most severe penalty that can be imposed on each party. See Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1338 (9th Cir. 1985) (referring to "severe sanctions of dismissal or default"). We therefore apply the same

standards to both. We also note that dismissal sanctions under Rule 37 are "subject to much the same considerations" as those under a court's inherent power, Halaco, 843 F.2d at 380, and therefore use both types of cases interchangeably.